

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN COURTNEY,

Defendant-Appellant.

UNPUBLISHED

August 28, 2001

No. 222010

Saginaw Circuit Court

LC No. 98-015889-FH

Before: K.F. Kelly, P.J., and White and Talbot

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct (“CSC III”), MCL 750.520d(1)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12. The trial court enhanced defendant’s sentence to a term of life imprisonment for each of the two convictions. Defendant appeals as of right. We affirm.

I. Basic Facts

Defendant stopped to assist the complainant and his family in a Saginaw parking lot after their car had broken down. Defendant thereafter befriended the family and invited them to stay at his home until their car was fixed. The complainant and his family were staying at defendant’s home for approximately one week when defendant sexually assaulted the complainant on two separate occasions. The victim was a thirteen-year-old adolescent who attended special education classes and despite his chronological age, functioned at a third grade level. A jury convicted defendant of two counts of CSC III. The court sentenced defendant as a fourth habitual offender to two life sentences.

II. Defendant’s Prior Convictions

First, defendant contends that the trial court relied on two constitutionally infirm convictions when it enhanced his sentence. We disagree. Defendant did not raise this objection at sentencing but instead raises this issue for the first time on appeal. Nevertheless, this Court may consider unpreserved constitutional challenges where the alleged error may have affected the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant claims that two of his prior felony convictions used to enhance his sentence were obtained without the benefit of counsel. In support, defendant references the presentence investigation report (“PSIR”), which indicates that for two separate convictions, defendant’s attorney was “unknown.” Defendant argues further that this notation on the PSIR constitutes prima facie evidence that those two convictions were obtained in violation of defendant’s right to counsel. We do not agree.

It is axiomatic that a trial court cannot consider prior convictions obtained in derogation of the right to counsel for purposes of meting out punishment for another offense. *People v Zinn*, 217 Mich App 340, 342; 551 NW2d 704 (1996). Initially, the defendant bears the burden of establishing that the prior conviction was obtained without the benefit of counsel. *Id.* at 343. To satisfy this burden, defendant must present:

(1) prima facie proof that a previous conviction was violative of *Gideon*¹, such as a docket entry showing the absence of counsel or a transcript evidencing the same, or (2) evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time. *Id.* (Citation omitted.)

A review of the record in the instant matter establishes that defendant did not meet his initial burden. The PSIR indicates that for two of defendant’s prior convictions, counsel was “unknown.” This is not sufficient to establish a prima facie case that these convictions were indeed procured without the assistance of counsel. See *Zinn, supra* at 344². Accordingly, we do not find that the trial court’s consideration of the disputed prior convictions to enhance defendant’s sentence constituted plain error requiring reversal.

III. Challenges to the PSIR

Next, defendant asserts that a 1974 conviction was improperly included in his PSIR and improperly considered by the trial court at sentencing. Inaccurate information considered by the sentencing court may implicate defendant’s right to due process. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990).

A defendant has a right to the use of accurate information at his sentencing, and if information in his PSIR is challenged, the court must respond to and make findings on those challenges. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). See also *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988); *People v Pierce*, 158 Mich App 113, 116; 404 NW2d 230 (1987). A sentencing court’s failure to respond to alleged inaccuracies in the PSIR may constitute error requiring resentencing. To adequately address the alleged inaccuracies, the sentencing court may:

¹ *Gideon v Wainwright*, 372 US 335; 83 Sct 792; 9 L Ed 2d 799 (1963).

² The *Zinn* court indicated that “mere silence regarding counsel” does not equate to that type of prima facie evidence required to establish that the defendant was convicted without the benefit of counsel.

[H]old an evidentiary hearing to determine the report's accuracy; (2) accept the defendant's unsworn statement; (3) ignore the alleged misinformation while sentencing. MCR 6.425(D)(3); *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990); *Brooks, supra* at 365.

In the case *sub judice*, defendant claims that a prior felony conviction was improperly listed on his PSIR. As regards that particular "conviction," defendant contends that prosecution on the 1974 charge was deferred in exchange for his guilty plea and he had successfully completed the required period of probation. At sentencing, defense counsel objected to the inclusion of this conviction on defendant's PSIR. The court overruled the objection based on the prosecution's statement that the conviction remained on the LEIN as a "conviction with probation" and that documents filed with the court by the PSIR's author indicated that the charge stood as a "conviction."

A review of the record in the case at bar indicates that defendant offered only an unsubstantiated assertion that his 1974 conviction should not be included on the PSIR. Defendant did not otherwise ask for an evidentiary hearing at which he could have provided the court with proof of his assertion. *People v Lawrence*, 206 Mich App 378, 380; 522 NW2d 654 (1994). Defendant had the opportunity to refute the alleged inaccuracy contained in his PSIR and failed to do so. The trial court heard defendant's challenges and the prosecution's response to those challenges and found that the listed conviction was valid and one on which it could rely when enhancing defendant's sentence. MCR 6.425(D)(3). We therefore do not find error in this regard.

IV. Prosecutorial Misconduct

Defendant next asserts that the prosecution, in its rebuttal argument, improperly vouched for the complainant's credibility and purposefully used derogatory verbiage to describe defendant to inflame and impassion the jury. Defense counsel failed to object to these comments at trial.

This Court reviews defendant's unpreserved claim of prosecutorial misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Issues pertaining to prosecutorial misconduct are reviewed case by case and the remarks to which defendant assigns as misconduct cannot be viewed in isolation. *Id.* at 721. Indeed, the scope of review must include the context in which the remarks were uttered. *Id.*

Although the prosecution may not vouch for a witness' credibility, *Schutte, supra* at 722, it is entirely proper for a prosecutor to respond to defense counsel's suggestions that a prosecution witness is fabricating testimony. *People v Sharbnaw*, 174 Mich App 94, 101; 435 NW2d 772 (1989). The remarks as to which defendant asserts misconduct cannot be viewed in isolation. In this case, the remarks made by the prosecution were in response to defense counsel's closing argument implying that the complainant and other prosecution witnesses conspired and concocted the charges against defendant. Prosecutors are not prohibited from reminding the jury of evidence and arguing that the evidence presented at trial supports a witness' credibility. *Schutte, supra* at 722; *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecution's remarks did not imply superior knowledge of the witness' truthfulness or overall credibility. *Schutte, supra* at 722.

Defendant also contends that he was denied a fair trial as a result of the prosecution's use of negative descriptors with regard to his person and the charged conduct. The prosecution's closing argument was peppered with words such as "sicko" and "sleazy" in direct reference to defendant and his alleged conduct. Additionally, the prosecutor used the word "disgusting" several times to describe not only defendant's conduct, but also the complainant's hesitancy to report the assault, the tenant's delay in calling the police, and defense counsel's theory of conspiracy. Defendant argues that the prosecution's use of these derogatory terms inflamed the jury and unfairly prejudiced him.

Prosecutors may, however, use "hard language" and are not required to couch their arguments in "soft" words calculated to avoid arousing emotion. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Indeed, a prosecutor "need not state her argument in the blindest possible terms." *Schutte, supra* at 722. Our review of the trial transcript in its entirety reveals that these comments by the prosecution were primarily limited to its rebuttal argument. A vigorously argued and otherwise sound trial will not be reversed on the basis of isolated remarks that could have been immediately cured by the trial court with a cautionary instruction had defense counsel timely objected. *Ullah, supra* at 679. Although the prosecution may have imprudently used certain adjectives when referencing defendant, those remarks, if timely objected to at trial, could have been addressed by the trial court immediately thus eliminating any possible prejudice to defendant. Accordingly, we do not find error requiring reversal.

V. Proportionality of Sentence

Finally, defendant argues that his sentence was disproportionate. This Court reviews issues pertaining to sentence proportionality for an abuse of discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Our Supreme Court in *Milbourn, supra*, held that an abuse of discretion occurs when a defendant's sentence violates the principle of proportionality. A sentence satisfies this principle when it is proportionate to the seriousness of the offense and the history of the offender. *Id.* at 636, 650.

In this case, the trial court based its sentence on a thorough examination of the instant offenses and defendant's background. As the trial judge noted, defendant's four prior felony convictions involved similar criminal sexual conduct against young males. Additionally, the instant convictions came to pass from assaults committed by defendant only ten months after his release from a thirteen-year sentence for the exact same offense. The *Milbourn* court instructs appellate courts to consider whether the circumstances surrounding a defendant's conviction place that defendant in the least or most threatening class *with respect to the particular crime*. *Milbourn, supra* at 654. Given defendant's consistent criminal behavior and prior convictions for identical crimes, we are convinced that defendant's sentence is "entirely proportionate to the seriousness of the offense and the circumstances of this offender." *People v Chandler*, 211 Mich App 604, 161; 536 NW2d 799 (1995). The sentencing court's imposition of the maximum sentence for both offenses did not constitute an abuse of discretion.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Michael J. Talbot